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EMPLOYER BULLETIN:

***THE U.S. SUPREME COURT
EXPANDS RETALIATION
PROTECTION TO EMPLOYEES***

On June 22, 2006, the United States Supreme Court issued a ruling which redefined Title VII of the Civil Rights Act's anti-retaliation provision. Title VII's anti-retaliation provision prohibits an employer from discriminating against an employee or job applicant who "opposes" any practice made unlawful by Title VII or "made a charge, testified, assisted or participated in" a Title VII proceeding or investigation.

FACTS: In *Burlington Northern & Santa Fe Railway Co. v. White*, the Plaintiff Employee complained her immediate supervisor made insulting and inappropriate remarks to her regarding women, in the presence of her co-employees. The supervisor was suspended; however, the Plaintiff Employee was also removed from her duties as a forklift operator and assigned to perform only standard track laborer tasks. Plaintiff Employee was advised this reassignment was being made to reflect co-workers' complaints that a "more senior man" should have the "less arduous and cleaner job" of forklift operator.

Plaintiff Employee then filed a complaint with the Equal Employment Opportunity Commission ("EEOC") claiming the reassignment was a result of unlawful gender based discrimination and retaliation for her earlier complaints about her supervisor. A few days after the Employer received the charge, Plaintiff Employee was suspended without pay for 37 days due to alleged insubordination. During the Employer's internal investigation, the Employer concluded Plaintiff Employee was not insubordinate, reinstated her to her position and awarded her back pay for the 37 days she was suspended. Plaintiff Employee then filed an additional retaliation charge with the EEOC based upon the suspension.

THE LAWSUIT: Plaintiff Employee filed a civil action complaint alleging the Employer's actions in changing her job and suspending her was unlawful retaliation. A jury found for Plaintiff Employee and awarded her \$43,500 in compensatory damages. A divided Sixth Circuit panel (Michigan is in the Sixth Circuit) reversed the judgment and found in favor of the Employer on the retaliation claims. The full Court of Appeals vacated the Sixth Circuit's decision and affirmed the trial court's judgment in favor of the Plaintiff Employee on both retaliation claims.

THE LAW IN DISPUTE: Title VII's anti-retaliation provision forbids employers from retaliating against employees. The Sixth Circuit has held an employee must prove he/she was subject to an adverse employment action which is defined as a "materially adverse change in the terms and conditions of employment." However, other Circuits have applied different standards.

The Seventh and District of Columbia Circuits have held the employee must show the employer's challenged action would have been material to a reasonable employee which means it would likely have dissuaded a reasonable worker from making or supporting a charge of discrimination. The Fifth and Eighth Circuits have adopted a more restrictive approach holding that an ultimate employment decision standard limits actionable retaliatory conduct to acts such as hiring, granting leave, discharging, promoting and compensation. The Ninth Circuit, on the other hand, has said that an employee must simply establish adverse employment treatment that is based on retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity.

THE ISSUE BEFORE THE SUPREME COURT: The Supreme Court reviewed the *Burlington* matter to resolve this disagreement among the Circuits. The Supreme Court was faced with deciding whether Title VII's anti-retaliation provision forbids only those employer actions and harms that are related to employment or the workplace in light of the fact there are no limiting words in the provision. Further, the Supreme Court had to characterize how harmful an act of retaliation had to be in order to fall within Title VII's protections. In other words, does the anti-retaliation provision cover only employer actions that would have been materially adverse to a reasonable employee or applicant?

THE DECISION: The Supreme Court held Title VII's anti-retaliation provision does not confine the actions and harms it forbids to those that are only employment related. Because the anti-retaliation provision of Title VII is silent on terminology related to employment actions (i.e., hire, discharge, compensation, etc.), there is no requirement that an employee actually suffer adverse actions related to employment. The Supreme Court noted the anti-retaliation provision seeks to protect employees by preventing an employer from interfering with an employee's efforts to secure or advance enforcement of Title VII's basic guarantees. The anti-retaliation provision seeks to prevent harm to employees based upon their conduct, not on any actual deprivation or conduct which results in an adverse employment action.

The Supreme Court further reasoned that if an employer could take actions not directly related to an employee's employment or by causing harm outside employment, this would not deter the many forms of retaliation that an employer could effectuate. As such, a material adverse action related to employment is not required in order to find retaliatory conduct has occurred.

Further, the Supreme Court found an employee seeking redress under Title VII's anti-retaliation provision must show a reasonable employee would have found the challenged action materially adverse. What this means is that the adverse action might have dissuaded a reasonable worker from making or

supporting a charge of discrimination. The adverse action cannot be trivial, petty slights or minor annoyances that often take place in the workplace and must be judged from an objective standard.

WHAT DOES THIS MEAN FOR EMPLOYERS? This decision will have a significant impact on employers. This ruling might result in an increase in retaliation claims filed by employees after making or supporting a claim or charge of discrimination. The decision has expanded what employers must recognize as an adverse action which is a required element of any retaliation lawsuit. Courts will likely dismiss fewer cases on summary judgment or summary disposition where the key issue is whether the challenged adverse action is "materially adverse."

WHAT CAN EMPLOYERS DO TO PROTECT THEMSELVES? In order to prevent retaliation lawsuits, supervisors and managers must clearly understand what is and what is not considered retaliation under the new Supreme Court ruling. Make sure your employees are educated on Title VII's retaliation provision and understand the implications when an employee files or participates in an investigation of a charge of discrimination. Employers should also review, and revise if necessary, their harassment/discrimination policies to ensure retaliatory actions are properly addressed. Further, before making any employment decisions make sure there are no retaliation concerns.

ANY FURTHER QUESTIONS SHOULD BE DIRECTED TO HEATHER G. PTASZNIK AT (313) 259-8586 OR JOHN T. BELOW AT (313) 259-8597

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